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7                   **UNITED STATES DISTRICT COURT**  
8                   **DISTRICT OF NEVADA**  
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10 JOSE MANUEL GARZA-CASTILLO,

11           Petitioner,

12 v.

13 MELLODY NALLELY GUAJARDO-  
14 OCHOA,

15           Respondent.

Case No. 2:10-cv-00359-LDG (VCF)

**ORDER**

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17         The respondent, Mellody Nallely Guajardo-Ochoa, has filed an emergency motion  
18 (#56) for an order allowing telephonic appearance of witnesses at a hearing scheduled to  
19 start January 11, 2012.

20         Pursuant to Federal Rule of Civil Procedure 43(a):

21         At trial, the witnesses' testimony must be taken in open court unless a federal  
22 statute, the Federal Rules of Evidence, these rules, or other rules adopted by  
23 the Supreme Court provide otherwise. For good cause in compelling  
24 circumstances and with appropriate safeguards, the court may permit  
25 testimony in open court by contemporaneous transmission from a different  
location.

26         The commentary to Rule 43(a) provides guidance. As stated in the rule,  
"contemporaneous transmission of testimony from a different location is permitted only on

1 a showing of good cause in compelling circumstances." The commentary goes on to note  
2 that "the most persuasive showings of good cause and compelling circumstances are likely  
3 to arise when a witness is unable to attend trial for unexpected reasons, such as accident  
4 or illness, but remains able to testify from a different location." Otherwise, "other possible  
5 justifications for remote transmission must be approached cautiously. Ordinarily  
6 depositions, including video depositions, provide a superior means of securing the  
7 testimony of a witness who is beyond the reach of a trial subpoena." Further, "deposition  
8 procedures ensure the opportunity of all parties to be represented while the witness is  
9 testifying." Finally, "good cause and compelling circumstances may be established with  
10 relative ease if all parties agree that testimony should be presented by transmission."

11 Guajardo-Ochoa filed her motion on the present date, January 4, 2012, for a hearing  
12 scheduled to commence January 11, 2012. The date of this hearing was set on  
13 September 27, 2011, after several prior continuances. Guajardo-Ochoa seeks to have her  
14 mother and brother (who reside in Mexico) appear and testify telephonically. She  
15 represents, in her moving papers, that on December 12 and 13, 2010, her mother went to  
16 the United States consulate in Monterey, Mexico, and attempted to obtain a permit allowing  
17 her entry into the United States for the original hearing date of January 18, 2011. She  
18 further represents that (at that time) she was, in essence, informed that she would not be  
19 able to obtain such a permit. In an attempt to secure the mother's attendance at the  
20 January 2011, hearing, the Court entered an Order in Lieu of Temporary Visa on  
21 December 14, 2010. Guajardo-Ochoa now represents, on "information and belief" that the  
22 United States Consulate will refuse to honor that order.

23 Absent from Guajardo-Ochoa's motion is any representation as to any efforts made  
24 since December 24, 2010, to permit her mother and brother to lawfully enter the United  
25 States for the hearing, though nearly a full year has passed since the hearing was first  
26 continued.

1       Rule 43(a) permits testimony to be contemporaneously transmitted from a different  
2 location only upon a showing of good cause in compelling circumstances. The  
3 commentary makes clear that compelling circumstances will generally refer to unexpected  
4 circumstances. When the circumstance precluding the in-court testimony of witnesses is  
5 expected, deposition (including video deposition) provides the superior means of securing  
6 the testimony. As summarized in the commentary, “a party who could reasonably foresee  
7 the circumstances offered to justify transmission of testimony will have special difficulty in  
8 showing good cause and the compelling nature of the circumstances.”

9       Guajardo-Ochoa has not provided any indication as to why the testimony of her  
10 mother and brother was not secured by deposition, including by video deposition. Given  
11 that more than a year has passed since Guajardo-Ochoa first became aware that it may be  
12 impossible for her mother and brother to travel to the United States to testify in court in her  
13 defense, and given that nearly a full year has passed in which she could have secured the  
14 testimony of her mother and brother by deposition (including video deposition), the Court  
15 cannot agree she has shown good cause *in compelling circumstances*.

16       As noted in the commentary, if the parties all agree that the testimony may be  
17 presented by transmission, such would establish with relative ease the good cause and  
18 compelling circumstances. Guajardo-Ochoa has not indicated that she has obtained the  
19 agreement of all parties.

20       Finally, (should all parties agree to the transmission of the testimony from Mexico),  
21 the Court would note that, while Guajardo-Ochoa is requesting a telephonic appearance,  
22 Rule 43(a) requires appropriate safeguards. Along similar reasoning, the commentary  
23 recognizes that video transmission ordinarily should be preferred. Guajardo-Ochoa has not  
24 made any effort to show that video transmission of the testimony of her mother and brother  
25 cannot be accomplished.

26       Therefore, for good cause shown,

1 THE COURT **ORDERS** that Mellody Nallely Guajardo-Ochoa's Emergency Motion  
2 for An Order Allowing Telephonic Appearance of Witnesses (#56) is DENIED.

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4 DATED this 11 day of January, 2012.  
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Lloyd D. George  
United States District Judge

